No. 84-6263

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JAMES KIRKLAND BATSON . . . **Petitioner**

versus

COMMONWEALTH OF KENTUCKY - **Respondent**

BRIEF FOR RESPONDENT

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I.

QUESTION PRESENTED

Is a trial court compelled by the Constitution to restrict the use of peremptory challenges by counsel in a particular case when members of an identifiable group are excluded from the jury panel?

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Contents	ii
Table of Authorities	iii- v
Summary or Argument	1- 3
Argument	3–26
A. Petitioner Failed to Present Proof in the Trial Court Regarding His Alleged Constitutional Violation	3- 6
B. The Effect of Peremptory Challenges is Not Confined to the Selection of a Jury, But Impacts the Entire Criminal Trial	6–14
C. The "Remedy" Proposed by Petitioner Will Serve Only as an Undue Strain on the Judicial Process with Little Recognizable Benefit	14–26
D. Justice is Better Served by the *Swain* Rule Than by the Proposed Rule	26
Conclusion	27

TABLE OF AUTHORITIES

Cases: PAGE

Apodaca v. *Oregon*, 406 U. S. 404 (1972) 13
Brown v. *Louisiana*, 447 U. S. 323 (1980) 13
Commonwealth v. *McFerron*, Ky., 680 S. W. 2d 924 (1984) 4
Commonwealth v. *Henderson*, 438 A. 2d 951 (Pa. 1981) 14
Commonwealth v. *Soares*, 387 N. E. 2d 499 (Mass. 1979), *cert. denied*, 444 U. S. 881 (1979) 4, 14, 25
Doepel v. *United States*, 434 A. 2d 449 (D.C. App. 1981), *cert. den.*, 454 U. S. 1037 (1981) 14
Evitts v. *Lucey*, 105 S. Ct. 830 (1985)..... 11
Hayes v. *Missouri*, 120 U. S. 68 (1887) 12
Herring v. *New York*, 422 U. S. 853 (1975) 11
Holley v. *J. & S. Sweeping Co.*, 192 Cal. Rptr. 74 (Cal. Ct. App. 1983) 17, 23
Johnson v. *Louisiana*, 406 U. S. 356 (1972) 13
Lewis v. *United States*, 146 U. S. 370 (1892) 25
McCray v. *Abrams*, 750 F. 2d 1113 (Cir. 1984), Pet. for Cert. filed, No. 84-1426 (March 4, 1984) 14
People v. *Alexander*, 205 Cal. Rptr. 387 (Cal. Ct. App. 1984) 18
People v. *Fuller*, 185 Cal. Rptr. 283 (App. 1982).. 18
People v. *Hall*, 672 P. 2d 859 (Cal. 1983) 18
People v. *Harvey*, 208 Cal. Rptr. 910 (Cal. Ct. App. 1984) 18
People v. *Johnson*, 583 P. 2d 774 (Cal. 1978) 21
People v. *McCray*, 443 N. E. 2d 915 (N.Y. 1982) *cert. denied* 461 U. S. 961 (1983) 14, 22, 24
People v. *Payne*, 457 N. E. 2d 1202 (Ill. 1983) 6, 14
People v. *Rousseau*, 179 Cal. Rptr. 892 (Cal. Ct. App. 1982) 18
People v. *Walker*, 205 Cal. Rptr. 778 (Cal. Ct. App. 1984) 18
People v. *Wheeler*, 583 P. 2d 748 (Cal. 1978) .....passim

PAGE

Peters v. *Kiff*, 407 U. S. 493 (1946) 19
Pointer v. *United States*, 151 U. S. 396 (1894) 7
Roman v. *Abrams*, 608 F. Supp. 629 (D.C. N.Y. 1985) 24
State v. *Crespin*, 612 P. 2d 716 (N.M. Ct. App. 1980) 14
State v. *Gilmore*, 489 A. 2d 1175 (N.J. Super. Ct. App. Div. 1985) 14
State v. *Neil*, 457 So. 2d 481 (Fla. 1984) 14
State v. *Raymond*, 446 A. 2d 743 (R.I. 1982) 14
State v. *Stewart*, 591 P. 2d 166 (Kan. 1979) 14
Swain v. *Alabama*, 380 U. S. 202 (1965) .....passim
Taylor v. *Louisiana*, 419 U. S. 522 (1975) .....passim
United States v. *Cancel*, 708 F. 2d 894 (3rd Cir. 1983), *cert. den.*, ___ U. S. ___, 104 S. Ct. 165, 78 L. Ed. 2d 151 (1983) 15
United States v. *Childress*, 715 F. 2d 1313 (8th Cir. 1983) (en banc), *cert. den.*, ___ U. S. ___, 104 S. Ct. 744, 79 L. Ed. 2d 202 (1984) 14
United States v. *Gouveia*, ___ U. S. ___, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984) 12
United States v. *Jenkins*, 701 F. 2d 850 (10th Cir. 1983) 15
United States v. *Leslie*, 759 F. 2d 366, *reh.* en banc granted, 759 F. 2d 366 (5th Cir. 1985) 14–15
United States v. *Mandujano*, 425 U. S. 564 (1976). 12
United States v. *Whitfield*, 715 F. 2d 145 (4th Cir. 1983) 14
Weathersby v. *Morris*, 708 F. 2d 1493 (9th Cir. 1983), *cert. den.*, ___ U. S. ___, 104 S. Ct. 719, 79 L. Ed. 2d 181 (1984) 15
Wendling v. *Commonwealth*, 143 Ky. 587, 137 S. W. 205 (1911) 12–13
Willis v. *Zant*, 720 F. 2d 1212 (11th Cir. 1983), *cert. den.*, ___ U. S. ___, 104 S. Ct. 3546, 82 L. Ed. 2d 849 (1984) 14

Constitutional Provisions: PAGE

U. S. Constitution Fifth Amendment .....passim
U. S. Constitution Sixth Amendment .....passim
U. S. Constitution Fourteenth Amendment .....passim
Ky. Const. § 7 12
Puerto Rico Const. Art. 2, § 11 13
Oregon Const. Art. 1, § 11 13
La. Const. Art. 1, § 17 13
Utah Const. Art. 1, § 10 13

Statutes:

Florida Stat. Annot., § 913.10 .....13, 25

Miscellaneous:

Ky. Rules of Crim. Proc. 9.40 3
Louisiana Code Crim. Proc. 782 13
50 C.J.S. *Juries* § 267 20
Black's Law Dictionary (5th Ed. 1979) 20
Note, *People* v. *Payne and the Prosecution's Peremptory Challenges: Will They Be Preempted,* 32 DePaul Law Review 399 (1983) 6, 8, 22
Younger, *Unlawful Peremptory Challenges,* 7 Litigation 23 (Fall 1980) 22, 26
Comment, *Is There a Place for the Challenge of Racially-based Peremptory Challenges?,* 1984 Det. C. L. Rev. 703 (1984) 22
Note; *Peremptory Challenges and the Meaning of Jury Representation,* 89 Yale L. J. 1177 (1980).. 22
Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md. L. Rev. 337 (1982) 16, 22

IN THE

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JAMES KIRKLAND BATSON - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

BRIEF FOR RESPONDENT

SUMMARY OF ARGUMENT

The use of peremptory challenges affects every criminal jury trial in America. Under the American adversary system, peremptory challenges are of great importance in affording the parties the confidence that the case will be heard by an impartial jury. Not only is it the function of the challenge to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide it on the basis of the evidence presented before them, and not otherwise. Peremptories are an integral part of the mechanism for choosing an impartial jury, just as is voir dire and the exercise of challenges for cause. Peremptory challenges should continue to be allotted to the prosecution and the defense.

In *Swain* v. *Alabama,* 380 U. S. 202 (1965) this Court held that it was not a violation of the Fourteenth

Amendment for the prosecutor to use his peremptory challenges to strike petit jury veniremen who are members of an identifiable group absent proof by the defendant that the prosecutor has done the same in previous cases over a period of time. Furthermore, the prosecutor's exercise of peremptories is presumed to be impartial and he need not give reasons for excusing the veniremen of an identifiable group.

Subsequent to *Swain*, this Court held that under the Sixth Amendment's guarantee of a jury trial in criminal prosecutions, petit juries need not mirror the community and reflect the various distinctive groups in the population. Therefore, a defendant is not entitled to a jury of any particular composition, but the jury wheels, pools of names, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. *Taylor* v. *Louisiana*, 419 U. S. 522 (1975). Kentucky submits these holdings are constitutionally sound and should be reaffirmed.

Petitioner's proposed remedy is a variation of the one adopted by California's highest court in *People* v. *Wheeler*, 583 P. 2d 748 (Cal. 1978), a criminal case decided pursuant to that state's constitution. *Wheeler* requires, when an objection is made, that the opposing side explain those peremptories used to exclude all or most of a readily identifiable group from the petit jury. Petitioner's variation is that only the prosecution must explain its challenges. This inequitable remedy is not consistent with the Equal Protection Clause of the Fourteenth Amendment and does not perpetuate jus-

tice or the appearance of such. Thus, the rule in *Swain* is based on equal protection considerations and presents a fair or equitable resolution in cases where the allegation is made that peremptory challenges are being exercised on the basis of group affiliation.

ARGUMENT

A. Petitioner Failed to Present Proof in the Trial Court Regarding His Alleged Constitutional Violation.

The facts demonstrate that the prosecutor used four of his six allotted peremptory challenges to strike the only four black persons on the venire.[1] The sum of petitioner's proof was that the prosecutor acknowledged and stated, "I struck four blacks and two whites" and "looking at them, yes; it's an all white jury" (TE 7-8; A 3). From this factual acknowledgement, petitioner presumed that the prosecutor struck the veniremen because of race discrimination. Petitioner's trial counsel failed to question the prosecutor or put any evidence on the trial record that the prosecutor had participated in striking affiliated groups, like the one at bar, in any other case. *Swain* at 224,

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[1]In Kentucky, the prosecution is entitled to five (5) peremptory challenges and the defendants jointly to eight (8) peremptory challenges. If one or two alternate jurors are chosen the number of peremptory challenges allowed each side shall be increased by one. If more than one defendant is being tried, the court may at its discretion allow additional peremptory challenges to each defendant. *Kentucky Rules of Crim. Proc.* 9.40. In the case at bar, the prosecutor was allowed six (6) peremptory challenges. The defense was allowed nine (9) to provide for an alternate who would be removed from the jury when the case was submitted.

227, 228. Consequently, petitioner's trial counsel failed to rebut the presumption of impartiality which was created when the prosecutor exercised his peremptory challenges. *Id.* at 222.

In petitioner's appeal to the Kentucky Supreme Court, his conviction in the circuit court was affirmed by a memorandum opinion which, in disposing of the jury issue, stated the following:

> "Appellant next contends that it was error to permit the prosecuting attorney to exercise peremptory challenges to all the blacks who were called as jurors in the case. Appellant acknowledged that the United States Supreme Court in *Swain* v. *Alabama*, 380 U. S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), held that peremptory challenges against blacks, by themselves, do not violate the Fourteenth Amendment Equal Protection Clause. However, appellant urges this Court to adopt the position of other states based upon the Sixth Amendment and their own state constitutions, that peremptory challenges against minority groups can be unconstitutional if they were shown to be a pattern of challenges against jurors from a discrete group in a likelihood that the challenges were based solely on group membership. *People* v. *Wheeler*, 583 P. 2d 748 (Cal. 1978), and *Commonwealth* v. *Soares*, 387 N.E. 2d 499 (Mass. 1979). We have recently affirmed our reliance upon Swain in *Commonwealth* v. *McFerron*, Ky., 680 S. W. 2d 924 (1984), holding that an allegation of the lack of a fair cross-sectional jury which does not concern a systematic exclusion from the jury drum does not rise to constitutional proportions, and we decline to adopt another rule." (A. at 8).

In dealing with petitioner's appeal, the Supreme Court of Kentucky acted with due deference to this Court's decision in *Swain* v. *Alabama*, and *Taylor* v. *Louisiana*, regarding the equal protection claim and the fair cross-section of the community requirement. As a result, the requirements of both the Fourteenth Amendment and Sixth Amendments were met in petitioner's case under the latest pronouncements of this Court.

Petitioner contends there is a constitutional necessity under the Sixth and Fourteenth Amendments for this Court to create a new rule that the prosecutor shall not have peremptory challenges in the traditional sense —unquestioned and unexplained—which would allow him to remove groups of people from the jury panel in a particular case. We submit that there is no such constitutional necessity and that, as stated in *Taylor* v. *Louisiana*, "defendants are not entitled to a jury of any particular composition. . . ." 419 U. S. at 538. *Taylor* and its progeny dealt only with state administered selection procedures which exclude groups from the jury venires, not from the petit jury:

> "Thus, in contrast to the Supreme Court's test for purposeful systematic exclusion under the Fourteenth Amendment, the Sixth Amendment cross-sectional analysis has been limited to the venire composition. Under both the Fourteenth and Sixth Amendments, group affiliation appears to be only a means by which a court identifies the scope of the community's participation in the jury system. According to *Swain* and *Taylor*, the constitutional requirement of community participation

> under either the Fourteenth or Sixth Amendment is satisfied when the venire represents a cross-section of the community, and when groups are not excluded systematically from the petit jury.
>
> *Swain* authorized judicial review when systematic exclusion occurred in case after case." Note, *People* v. *Payne* and the Prosecution's Peremptory Challenges: Will they be Preempted? 32 DePaul L. Rev., 399, 416-417 (1983).

Petitioner makes no claim of systematic exclusion of blacks on a case-after-case basis. There is no information in the record relating to any case other than his.[2] Kentucky contends that the *Swain* rule should survive petitioner's attack and prosecutors should continue to be allowed to exercise peremptory challenges without question, explanation or judicial scrutiny.

Other than petitioner's claim regarding petit jury composition, he fails to allege and demonstrate that the jury ultimately selected was partial or prejudiced. Absent petitioner's unproven allegation of discrimination, the record does not illustrate that petitioner's trial was unfairly conducted or its result was unreliable because the jurors were not impartial.

B. The Effect of Peremptory Challenges Is Not Confined to the Selection of a Jury, But Impacts the Entire Criminal Trial.

The elimination or qualified use of the peremptory challenges tugs at the very fiber of a criminal trial,

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[2]By contrast the Court in *Swain* had information that "no negro had actually served on a petit jury since about 1950." *Swain*, at 205.

that is, the existence of an impartial jury to hear the case. As set forth below, peremptories are essential to the overall criminal process.

1. The Importance of Peremptory Challenges.

In *Swain* v. *Alabama*, 380 U. S. 202 (1965), this Court examined the common law history, nature and function of the peremptory challenge. The conclusion was that it is "one of the most important of the rights secured to the accused." *Id.* at 219 (quoting *Pointer* v. *United States*, 151 U. S. 396, 408 (1894)). Although this Court held that peremptory challenges were not constitutionally required, *Id.* at 219-220, it added that:

> "[A]lthough historically the incidents of the prosecutors challenge has differed from that of the accused, the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be even[ly] held.'" *Id.* at 220.

The importance of the peremptory challenge has been stated as follows:

> "In formulating its standard in *Swain*, the Supreme Court recognized that to achieve the underlying purpose of peremptory challenges, they must be exercised without reason and without subjection to the court's control or inquiry. (Footnote omitted). Peremptory challenges, according to *Swain*, were important in achieving an impartial jury because they enabled a party to excuse pro-

spective jurors on the basis of either a real or imagined subjective perception of bias which ordinarily could not be established during voir dire. The *Swain* court noted that these perceptions frequently were based on considerations such as juror appearance or demeanor, and characteristics such as religion, occupation, race and socio-economic background. (Footnote omitted). The court noted that permitting judicial inquiry into the reason for exercising a peremptory challenge would radically alter the function and nature of the device. (Footnote omitted). Therefore, even though an individual prosecutor exercised his challenges to shape the racial composition of a single petit jury, his peremptory challenges were not subject to the requirements of equal protection. (Footnote omitted).

Swain thus demonstrated the court's fear that opening the peremptory challenge to attack would undermine its function. The court's endorsement of the peremptory acknowledged that racial factors were legitimate trial-related basis for exercising the peremptory challenge. (Footnote omitted). Furthermore, Swain recognized the impossibility of applying a traditional systematic exclusion analysis to the small number of individuals presented on the venire within a particular trial. (Footnote omitted)." 32 Depaul L. Rev. 399, 403, 404 (1983).

Despite occasional complaints from the defense bar, special interest groups and legal theorists seeking perfection in adjudicatory process, nothing has happened in the last twenty years to show that the decision in

Swain does not best serve the interests of a fair trial or that a better rule for the use of peremptories can be devised.[2]

2. Trial by Jury.

In *Swain* this Court recognized two different scenarios for use of peremptory challenges. The first involved the use of group characteristics as a means of identifying probable prejudice in a particular case. This Court concluded such usage was proper and a traditional part of the jury system as known to the common law and American jurisprudence. The second scenario, which this Court would find improper if proven, concerned the prosecutor's use of peremptories in multiple cases which shows a pattern of systematically excluding identifiable groups.

So deeply ingrained in the jury system is the peremptory challenge that the dissenters in *Swain* found no fault with the majority's holding that peremptory challenges used on a racial basis in a particular case were not improper. Justice Goldberg joined by Chief Justice Warren and Justice Douglas dissented, stating the following:

> "The holding called for by this case is that where as here, a negro defendant proves that negroes

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[2]One of the amicus briefs suggests that when a minority person is struck from the petit jury "he or she should be replaced by a member of the same group." Brief for Amici Curae of NAACP Legal Defense and Educational Fund, Inc., The American Jewish Committee, and The American Juris Congress, at 51. This proposal places more importance upon achieving a mirror image of the community than an impartial jury.

constitute a substantial segment of the population, that negroes are qualified to serve as jurors, and that none or only a token has served on juries over an extended period of time, a prima facie case of the exclusion of negroes from juries is then made out; . . . and that the state wholly fails to meet the prima facie case of systematic and purposeful racial discrimination by showing that it has been accomplished by the use of a peremptory challenge system unless the state also shows that it is not involved in the misuse of such a system to *prevent* all negroes from ever sitting on *any jury*. Such a holding would not interfere with the rights of defendants to use peremptory challenges, nor the *right of the state to use peremptories as they normally and traditionally have been used*. It would not mean . . . that negroes are entitled to proportionate representation on a jury. . . . Nor would it mean that where systematic exclusion of negroes from jury service has not been shown, a prosecutor's motives are subject to question or judicial inquiry when he excludes negroes or any other group from sitting on a jury *in a particular case. Only where systematic exclusion has been shown*, would the state be called upon to justify its use of peremptories or to negative the state's involvement in discriminatory jury selection." (Emphasis added; *Swain* at 244-245).

It is obvious that the *Swain* Court was unanimous in its opinion and also agreed that a prosecutor's use of peremptories in any particular case should not be examined. The dissenters differed with the majority only in that they thought that the facts educed in the

record as to repetitive practices in the jurisdiction made a prima facie case of systematic exclusion of negroes from serving on any jury. We believe the dissenters in *Swain* would agree with our position that there is no constitutional violation when the prosecution uses peremptories as a traditional part of the jury system. Additionally, there is nothing in the record in this case to show that the prosecution's use of challenges were contra to traditional jurisprudence usage. Such an issue has not been raised in the matter at bar.

3. Adversary System.

Petitioner argues at length that the prosecutor does not have a "right" to peremptory challenge. He extends this conclusion for the purpose of further arguing that only the prosecution should explain the use of the peremptory challenges when an allegation has been made by the defense that the prosecution has exercised its peremptory challenges because of bias. Such an approach to resolve the question at bar is contrary to all notions of fair play and justice.

The adversary system has been adulated in many opinions of this Court and attributed directly to the Bill of Rights. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objectives that the guilty be convicted and the innocent go free." *Evitts* v. *Lucey*, ___ U. S. ___, 105 S. Ct. 830 (1985) quoting from *Herring* v. *New York*, 422 U. S. 853 (1975). The system is especially cher-

ished when compared with the inquisitorial system recognized in some countries.[4] One of the chief features of the adversary system is that "the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'" *Swain* v. *Alabama*, 380 U. S. 202, at 220, quoting *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887). One of the details of the system is that the prosecution and the defense shall have peremptory challenges "exercised without a reason stated, without inquiry and without being subjected to the court's control." *Id.*

4. Unanimous Verdict.

Section 7 of Kentucky's Constitution provides:

> "Trial by jury inviolate.
> The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this constitution."

By looking to the common law, the highest court of Kentucky interpreted this constitutional provision to mean that an accused in a criminal or penal case has the right to a trial in a court of justice presided over by a judge, trial before a jury of twelve men, and that all of them shall agree upon the verdict. *Wend-*

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[4] *United States* v. *Gouveia*, ___ U. S. ___, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984); *United States* v. *Mandujano*, 425 U. S. 564 (1976).

ling v. *Commonwealth*, 137 S. W. 205, 207 (Ky. 1911). Only three jurisdictions in the United States differ from Kentucky in requiring a unanimous verdict to convict or acquit in a criminal case.[5]

Two states differ from Kentucky in authorizing juries of less than twelve members in all criminal cases, but those states require a unanimous verdict of twelve persons to convict or acquit in a case involving a capital offense.[6]

Peremptory challenges or strikes are of more importance in a justice system which requires a unanimous verdict to convict. These challenges, which vary from state to state, are indispensible in reducing the number of veniremen to the required number of twelve impartial jurors.

Without the benefit of the prosecutions peremptories, the balance between the initial selection of the venire from a representative cross-section of the com-

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[5]Puerto Rico allows a verdict reached by nine of twelve jurors. Const. Art. 2, §11. Oregon requires ten of twelve jurors to convict or acquit for all criminal trial offenses with the exception of a unanimous verdict for a conviction of first degree murder. Const. Art. 1, §11; upheld in *Apodaca* v. *Oregon*, 406 U. S. 404 (1972). In Louisiana ten of twelve jurors are required to convict or acquit in all lesser cases; Const. Art. I § 17; La. Code Crim. Proc. 782; *Johnson* v. *Louisiana*, 406 U. S. 356 (1972; *Brown* v. *Louisiana;* 447 U. S. 323 (1980).

[6]Utah requires an eight person jury to reach a unanimous verdict in all criminal cases except cases involving a capital offense when a jury of twelve members and a unanimous verdict is required. Const. Art. 1, § 10. Florida requires the unanimous verdict of twelve jurors to convict or acquit in a case involving a capital offense. A unanimous verdict by six jurors is required in all other criminal jury trials. Florida Stat. Annot., § 913.10.

munity and the ultimate selection of an impartial jury cannot be struck. Consequently, the absence of an impartial jury would all but eliminate the possibility of a unanimous verdict.

C. The "Remedy" Proposed by Petitioner Will Serve Only as an Undue Strain on the Judicial Process with Little Recognizable Benefit.

Petitioner urges this Court to adopt the rule of peremptory challenge validity created by the California Supreme Court in *People* v. *Wheeler*, 583 P. 2d 748 (Cal. 1978), a rule expressly rejected by several jurisdictions but imitated by others.[7] The *Wheeler* rule

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[7]The Wheeler rule was rejected by the highest appellate courts of Illinois, Kansas, Kentucky, New York, Pennsylvania, Rhode Island, and the District of Columbia, *People* v. *Payne*, 457 N. E. 2d 1202 (Ill. 1983), *State* v. *Stewart*, 591 P. 2d 166 (Kan. 1979), *Batson* v. *Commonwealth*, A. at p. 5, *People* v. *McCray*, 443 N. E. 2d 915 (N.Y. 1982), *cert. den.*, 461 U. S. 961 (1983), *Commonwealth* v. *Henderson*, 438 A. 2d 951 (Pa. 1981), *State* v. *Raymond*, 446 A. 2d 743 (R.I. 1982), *Doepel* v. *United States*, 434 A. 2d 449 (D.C. App. 1981), *cert. den.*, 454 U. S. 1037 (1981). *Wheeler* was adopted by Florida, Massachusetts, New Jersey, and New Mexico. *State* v. *Neil*, 457 So. 2d 481 (Fla. 1984), *Commonwealth* v. *Soares*, 387 N. E. 2d 499 (Mass. 1979), *cert. den.*, 444 U. S. 881 (1979), *State* v. *Gilmore*, 489 A. 2d 1175 (N.J. Super. Ct. App. Div. 1985), *State* v. *Crespin*, 612 P. 2d 716 (N.M. Ct. App. 1980). Among the federal circuit courts, versions of the *Wheeler* rule were judged unacceptable by three circuits. See *Willis* v. *Zant*, 720 F. 2d 1212 (11th Cir. 1983), *cert. den.*, ____ U. S. ____, 104 S. Ct. 3546, 82 L. Ed. 2d 849 (1984), *United States* v. *Childress*, 715 F. 2d 1313 (8th Cir. 1983) (en banc), *cert. den.*, ____ U. S. ____, 104 S. Ct. 744, 79 L. Ed. 2d 202 (1984), *United States* v. *Whitfield*, 715 F. 2d 145 (4th Cir. 1983), but found satisfactory by two circuits. *McCray* v. *Abrams*, 750 F. 2d 1113 (2nd Cir. 1984), Pet. for Cert. Filed, No. 84-1426 (March 4, 1984), *United States* v. *Leslie*, 759

(Continued on next page.)

allows judicial review of the use of peremptories upon a prima facie showing of the circumstances of one case. The test derived from *Wheeler* consist of four steps. First, the objecting party must raise a "strong likelihood" that members of a cognizable group protected by the representative cross-section rule are being challenged for no reason other than their group association. *Id.* at 764. Second, the trial judge must make a determination that the pattern of peremptories in this one case gives rise to a "reasonable inference" of use based on group bias. *Id.* at 764. Third, if an inference is found, the burden shifts to the opposing party to suggest a reason to the satisfaction of the trial judge that the challenges were not properly exercised. *Id.* at 765. Fourth, the trial judge decides whether the "burden of justification" is met. If the objection is sustained, the trial judge shall dismiss the jurors, remaining veniremen and draw a new venire. *Id.* at 765.

While superficially innocuous, the adoption of the *Wheeler* rule would be of far reaching harm to the

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F. 2d 366, *reh.* en banc granted, 759 F. 2d 366 (5th Cir. 1985). The precedents of three additional circuits suggests their adherence to *Swain*. *Cf. Weathersby* v. *Morris*, 708 F. 2d 1493 (9th Cir. 1983), *cert. den.*, ____ U. S. ____, 104 S. Ct. 719, 79 L. Ed. 2d 181 (1984) (*Taylor* analysis does not extend to petit juries.), *United States* v. *Cancel*, 708 F. 2d 894 (3rd Cir. 1983), *cert. den.*, ____ U. S. ____, 104 S. Ct. 165, 78 L. Ed. 2d 151 (1983) (Refusal to change the rule that "neither side need justify the use of peremptory challenges."), *United States* v. *Jenkins*, 701 F. 2d 850 (10th Cir. 1983) (Showing of systematic and intentional exclusion required to demonstrate unconstitutional use of peremptory challenge.).

judicial processes of this Nation, because each step of the rule presents an invitation to confusion and litigation.

1. Petitioner's Proposed Remedy is a Radical Departure from the Traditional Use of Peremptory Challenges.

Petitioner urges the adoption of the reasoning and remedy of *Wheeler*. However, unlike the first step in *Wheeler*, he proposes the total elimination of prosecutorial peremptory challenges.

His proposed remedy would tilt the balance of selecting an impartial jury. The result of this uneven procedure would be the selection of a partial jury or one of a particular composition. This is a radical procedure which would eliminate the traditional usage of peremptory challenges, destroy one of the procedures which guarantees the selection of an impartial jury and limit the prosecutor's participation in the jury selection process. See Saltzburg and Powers, Peremptory Challenges and the Clash Between Impartiality and Group representation, 41 Md. L. Rev. 337, 355-357 (1982).

2. The Second Step of the *Wheeler* Rule Creates a Standard for Judicial Review That is Unavoidably Vague and Impossible to Consistently Apply.

Step two of the *Wheeler* test requires a judicial determination of when protection shall begin by either a finding of a "reasonable inference" of improper bias in the use of peremptories or a conclusion to the contrary. This standard, will cause " 'difficult and often

close judgments'," *Wheeler* at 764, and is so vague that it will be impossible to consistently apply. In a reluctant concurrence in *Holley* v. *J. & S. Sweeping Co.*, 192 Cal. Rptr. 74 (Cal. Ct. App. 1983), a fear was expressed that Wheeler's "application from case to case will take the courts into the quagmire of quotas for groups that are difficult to define and even more difficult to quantify in the courtroom." *Id.* at 79.

The *Wheeler* court rejected the use of statistical analysis to establish a mathematical likelihood of a violation of the rule. The court recognized the inherent complexities of such methods and found it deficient because of the inability to accurately evaluate peremptory challenges. The court rejected the use of statistical analysis in a single case because of the discretionary use of the challenge and the existence of a small number of veniremen from which to draw a statistical sample *Id.* at 763.

The California Supreme Court suggested that certain facts may be given special consideration by the trial judge in reaching a decision. The fact of primary importance is the showing that a disproportionate number of a cognizable group are being removed. *Id.* at 764. What constitutes "disproportionate" for the purposes of this rule is left as unclear by the court as what groups are considered "cognizable." As the rule itself is founded on case-by-case review, it would seem that a trial judge at each objection must define disproportionate according to the circumstances as they

exist in the issue before him.[8] This will lead to a chameleon-like rule, the color of whose meaning will change as frequently as the facts to which it is applied.

The *Wheeler* court also found the manner in which voir dire examination is conducted, and the group membership of defendant in relation to that of the victim, to be supplemental factors for consideration to the primary concern of disproportionate removal. What weight is to be given these factors is now disputed in California courts. See *People* v. *Fuller*, 186 Cal. Rptr. 283 (Cal. App. 1982). *Wheeler* implies that inconsistent thoroughness in voir dire questioning or when conducted in desultory fashion is grounds for concern. The Court inferred that such questioning indicates a settled intent to strike on the part of the inquiring counsel. If any inconsistency in degree of defense or prosecution questioning can lead to a requirement to give reason for a peremptory challenge, counsel will either consistently make little use of the

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[8]In the six years since the decision of *Wheeler*, the California Courts are struggling to define the "reasonable inference" standard in practical terms. See *People* v. *Rousseau*, 179 Cal. Rptr. 892 (Cal. Ct. App. 1982) (Striking of two of two group members was not prima facie evidence of improper use of peremptory challenges.) *Holley, supra*, (striking of three or four members was prima facie.) *People* v. *Hall*, 672 P. 2d 859 (Cal. 1983), (Striking of four of eight members was prima facie.), *People* v. *Walker*, 205 Cal. Rptr. 778 (Cal. Ct. App. 1984) (striking of seven of nine members was prima facie.) *People* v. *Alexander*, 205 Cal. Rptr. 387 (Cal. Ct. App. 1984) (Striking of four of five members was not prima facie.) *People* v. *Harvey*, 208 Cal. Rptr. 910 (Cal. Ct. App. 1984) (striking of two of three members was not prima facie.)

opportunity or uniformly indulge in a great number of queries even where frivolous.

The group memberships of the defendant and victim are less useful than the *Wheeler* Court implies because the affiliation is irrelevant to raising an objection regarding a possible violation of the representative cross-section rule. *Peters* v. *Kiff*, 407 U. S. 493 (1946). The trial court must consider the concerns of all those who assert that their right to fair trial is being violated whether the defendant and victim meet separate demographic classification or not.

3. The Third Step of the *Wheeler* Rule Changes the Peremptory Challenge to a Challenge for Cause Without Effectively Preventing the Biased Removal of Group Members from the Jury.

Once a judicial determination is made that a reasonable inference of misuse of a challenge exists, *Wheeler* then requires the opposing party to justify its actions. A reason of "specific bias" on the part of an individual veniremen and not simply a bias based on group association must be presented to the trial court to allow the questioned peremptory challenge to stand. *Id.* at 765.

Even though the *Wheeler* court stated that the "showing need not rise to the level of a challenge for cause," *Id.* at 765, the result of the rule would be the forcing of just such a conclusion.

The California Supreme Court, while insisting a recognizable difference remained, defined both the justification for a peremptory challenge and the pur-

pose of a challenge for cause as an attempt to remove an individual juror for "specific bias." *Id.* at 760. The requirement proposed for use in the third step of *Wheeler* is practically indistinguishable from the traditional meaning of a challenge for cause.[9] It will be an impossible task for trial judges to find a practical distinction between the two standards if the highest appellate court of California, after long and careful deliberation, cannot articulate separate definitions.

In an attempt to avoid the transformation of the peremptory, prosecution and defense counsels will develop a great wardrobe of explanations to dress their claims and clothe any biased intent. The *Wheeler* rule can only ask for a satisfactory reason and not the genuine reason for the exercise of a challenge. This limitation can be readily recognized and is obvious.

Not only will the *Wheeler* rule fail to adequately prevent what can be described as improper bias, but it may also serve to compel the acceptance by counsel of a jury he does not find to be impartial. Defense counsel, for example, may be compelled to accept the presence of Jewish jurors despite his fear that the

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[9] "Challenges to the favour are where the party hath no principal circumstances of suspicion." 3 Blackstone Commentaries 362. "Challenge for cause. A request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons." Black's Law Dictionary (5th Ed. 1979). "A Challenge for cause is a challenge to a juror for which some cause or reason is alleged, and is used to raise an objection to the qualifications or competency of particular jurors." 50 C.J.S. *Juries* 267.

obvious anti-Semitism of one of his key witnesses will inevitably prejudice such jurors against his client. Adoption of *Wheeler* or a variation of it will foster juries which are not impartial and are of a particular composition. *People* v. *Johnson*, 583 P. 2d 774 (Cal. 1978).

4. The Fourth Step of the *Wheeler* Rule Will Lead to Lengthy Delays in the Trial Process.

The trial judge, having heard the arguments of the prosecution and defense, must, at his discretion sustain or overrule the objection. If it is overruled, voir dire continues until completion and the jury is impanelled. On the other hand, if the objection is sustained, *Wheeler* requires the dismissing of the tainted venire and the drawing of a new one. *Id.* at 765. The California Supreme Court reached this conclusion by finding the intent of the fair and representative cross-section rule violated, because of the forced selection of a jury from a venire "partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges." *Id.* at 765. The clear result of the procedures mandated by the *Wheeler* rule will be that the "lengthy process of voir dire will be rendered lengthier still." *Wheeler*, dissent at 769.

In rejecting a version of petitioner's "remedy" for use in their jurisdiction, the Court of Appeals of New York articulated the fear that:

> ". . . [T]o the extent that restrictions on a party's exercise of the peremptory challenge would require more extensive voir dire to disclose provable racial biases, as well as requiring extensive evi-

> dentiary hearings on motions to determine the motives of a party exercising a peremptory challenge, the rule proposed by the defendant would invite the additional delays at trial which our justice system can ill afford. In this era of overcrowded court calendars and scarce judicial resources, we should not alter the trial stage in such a way as to necessitate or encourage unwarranted additional lengthy delays." *People* v. *McCray*, 443 N. E. 915 (N. Y. 1982).

The burden on the administration of the justice system may also be felt by a compelled enlargement of the entire jury pool to accommodate the increased demand for completely new venires to comply with the representative cross-section rule as applied to the petit jury by an adoption of *Wheeler*.

5. The *Wheeler* Rule was Conceived For Use in a Particular Jurisdiction and the Problems of Applying it Nationally Will Lead to a Burdensome Increase in Appeals and Put an End to the Effective Use of the Peremptory Challenge.

The *Wheeler* rule is clearly problematic.[10] It is a rule which trial judges will be unable to consistently

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[10]Several commentators have criticized as flawed and termed unnecessary the rule articulated in *Wheeler*. See Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. Rev. 337 (1982), Younger, *Unlawful Peremptory Challenges*, 7 Litigation 23 (Fall 1980), Note, *People* v. *Payne and the Prosecution's Peremptory Challenges: Will They Be Preempted?* 32 Depaul L. Rev. 399 (1983), Comment, *Is There a Place for the Challenge of Racially-Based Peremptory Challenges?* 1984 Det. C. L. Rev. 703 (1984), Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 Yale L. J. 1177 (1980).

apply. It will require explanation of all peremptory challenges and will not detect or deter genuine improper bias. The conflicts and confusion by adopting *Wheeler* will generate and provide fertile ground for litigation and appeals.

The conclusion of the trial judge, on which the *Wheeler* rule so greatly relies, will frequently be termed an abuse of discretion by those parties who receive judgments adverse to their interest. This characterization will serve as foundation for an expansive number of claims for appeal, and when the decided majority of these contested convictions are affirmed through the appellate process, this assertion of error will become the justification for a petition for writ of habeas corpus. The *Wheeler* rule has already been extended into civil jury selection in the California courts. *Holley* v. *J & S Sweeping Co.*, *supra*. This extension further taxes the strained resources of a judicial system. It is the inherent nature of rules that are substantially subjective that they increase the demand for appellate courts to review the decisions of the trial judge. The California Supreme Court concluded that the right impaired is so fundamental that any discovered error is "prejudicial per se." *Wheeler*, at 766. The extention of such reasoning to all the judicial systems that are touched by the judgments of this Court would be a profound hindrance to the effective administration of justice. A federal district court aptly termed "pernicious" any rule that permits:

> ". . . [A]n individual, convicted of conspiracy to commit arson by blowing up a building within

> the City of New York, to overturn his conviction merely due to the invidious actions of a prosecutor in excluding a cognizable group from a petit jury concerning which there is *no reason to believe that those trial jurors finally selected were not fair and impartial*, simply because white jurors had been systematically excluded." *Roman* v. *Abrams*, 608 F. Supp. 629 (D.C. N.Y. 1985). (Emphasis added).

In finding all error harmful, the *Wheeler* court relies entirely on California state decisions. This reliance underlines the peculiar nature of this rule which petitioner and various amici fail to recognize. *Wheeler* is a judgment of a state court, interpreting a state constitution, and crafting a standard for use in a specific state system. The Supreme Court of Kentucky reviewed the *Wheeler* decision and found it unacceptable for use in this jurisdiction stating, "[w]e have recently reaffirmed our reliance upon *Swain* . . . and we decline to adopt another rule." (A 8). In *People* v. *McCray*, the Court of Appeals of New York stated:

> The defendant, in effect, would require the prosecutor to prove that a prospective juror's racial biases, whether based upon group affinity or otherwise, would interfere with the attainment of a fair and impartial verdict before that juror could be excused. We decline to adopt this position for it would convert the peremptory challenge system into a system based solely upon challenges for cause. Indeed, *we find no persuasive reason for departing from our present method of jury selection*. *McCray* at 917. (Emphasis added)

In states which have adopted the *Wheeler* rule, the particular procedures of those jurisdictions enhances the ability of the parties to influence the composition of the petit jury. In Massachusetts sixteen peremptory challenges are afforded each defendant and an equal number to the defense total is allowed the prosecution. Consequently, in *Commonwealth* v. *Soares*, 387 N.E. 2d 499, 508 fn. 6 (Mass. 1979), ninety-six peremptory challenges were available for use in selecting the twelve-person, petit jury. In the case *sub judice*, the prosecution was allowed only six (6) peremptory challenges and the defense nine (9). In Florida an individual convicted of an offense similar to that of petitioner's, could be found guilty by a petit jury of only six. Florida Stat. Annot., Section 913.10. It was with an awareness of these unique procedures that the high courts of these two states accepted the *Wheeler* rule into the law of their respective legal systems.

The peremptory challenge found its way into our common law legal system many years before the discovery of the continent upon which this Nation was established. In *Lewis* v. *U. S.*, 146 U. S. 370, 376 (1892) this Court described the peremptory as coming "from the common law with the trial by jury itself" and as having "always been held essential to the fairness of trial by jury."

The broad implications of petitioner's proposed "remedy" must be recognized and the rule's true results foreseen, for:

> "[T]he real question is whether to tinker with a system, be it of jury selection or anything else, that

has done the job for centuries. We stand on the shoulders of our ancestors, as Burke said. It is not so much that the past is always worth preserving, he argued, but rather that "it is with infinite caution that any man ought to venture upon pulling down an edifice, which has answered in any tolerable degree for ages the common purposes of society. . . ." However fair these decisions may seem in the abstract, in practice they undermine the jury trial. Let us hope that other courts take a more searching look at the problem." Younger, *Unlawful Peremptory Challenges,* 7 Litigation 23 (Fall 1980).

D. Justice is Better Served by the *Swain* Rule Than by the Proposed Rule.

Swain properly holds that only systematic exclusion of an identifiable group from jury service is a constitutional violation, because it excludes the group from participating in a function of citizenship. This holding should be reaffirmed.

Kentucky urges the Court to again hold that the Constitution does not give a criminal defendant the right to a jury of any particular composition, there should be no presumption of a constitutional violation when all of a cognizable group are struck from the jury panel in a particular case and state courts may continue to allow peremptory challenges in the traditional sense under the Fourteenth and Sixth Amendments of the Constitution.

CONCLUSION

The holdings of *Swain* and *Taylor*, are constitutionally sound and should be reaffirmed. The *Wheeler* test or any variation of it should be rejected because it was created pursuant to California law, would create judicial confusion and is too vague to apply nationwide. Consequently, the traditional use of peremptory challenges should continue as an integral part of American jurisprudence.

Respectfully submitted,

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